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No. 85-1100

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that a grand jury subpoena requiring the production of the fee records of an attorney who had represented him in a prior unrelated case violates his Sixth Amendment right to counsel, his Fifth Amendment privilege against compelled self-incrimination, and the attorney-client privilege.

1. a. On October 18, 1984, a grand jury in the District of Maryland that was investigating possible criminal tax violations by petitioner issued a subpoena to attorney William J. Garber. The subpoena required Garber to produce a retainer agreement and fee records relating to his representation of petitioner in connection with a 1981 narcotics case in the District of Columbia. Pet. App. 2a-5a. On November 27, 1984, petitioner, through another attorney, unsuccessfully moved to quash the subpoena on the ground that the fee records were protected by the attorney-client privilege

(*id.* at 6a). The district court denied petitioner's motion for a stay pending appeal, concluding on the basis of an in camera review that the records "solely concern fee arrangements and payments" and, as such, "are exactly the type of documents not covered by the attorney-client privilege" (*id.* at 26a). The records in question were then released to the grand jury, which to date has not returned an indictment against petitioner.

b. The court of appeals affirmed the district court's denial of petitioner's motion to quash (Pet. App. 1a-17a; 774 F.2d 624). The court first rejected petitioner's argument that, because the subpoena created the possibility that Garber would be required to testify against petitioner at trial if an indictment were returned, the subpoena denied petitioner his asserted Sixth Amendment right to the assistance of counsel of his choice (Garber) at such a trial. In the court of appeals' view, there were a number of ways in which the records could be introduced at a trial (*e.g.*, by stipulation or through the testimony of a bookkeeper) without placing Garber in a conflict-of-interest situation and requiring his disqualification. Pet. App. 11a-12a. But in any event, the court was unwilling to accept the proposition that fee records are absolutely immune from production simply because there is a possibility that the attorney might be retained to represent the target again in subsequent proceedings (*id.* at 12a).

The court of appeals also rejected petitioner's contention that this case fell within an exception to the general rule that fee records are outside the scope of the attorney-client privilege—an exception petitioner contended was applicable because there was a strong prossibility that disclosure would implicate him in the very matter for which he sought legal advice in the first place. The court explained that the current grand jury investigation concerns possible criminal tax liability, a matter unrelated to the narcotics charges for which petitioner sought Garber's legal advice. Pet. App.

13a-15a. Finally, the court held that because the "subpoena in this case does not require [petitioner] to do anything and certainly does not compel him to be a witness against himself[,] * * * the fifth amendment provides no basis for quashing the subpoena" (*id.* at 16a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

a. As the court of appeals observed (Pet. App. 12a), petitioner does not challenge the settled principle that attorney-fee records are outside the scope of the attorney-client privilege, which protects only confidential communications by the client to his lawyer. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Petitioner argued below that such fee records nevertheless should be protected by the attorney-client privilege, even though no confidential communications would be disclosed, if there is a strong possibility that their disclosure would implicate the client in the very matter for which legal advice was sought in the first place. We agree with the courts of appeals that have rejected such an exception, which would have no relation to the privilege's purpose of protecting confidential communications by the client. See *In re Shargel*, 742 F.2d 61, 62 n.2, 63-64 (2d Cir. 1984); *In re Witnesses Before the March 1980 Special Grand Jury*, 729 F.2d 489, 493-495 (7th Cir. 1984); *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982). See also *United States* v. *Ricks*, 776 F.2d 455, 465 (4th Cir. 1985).[1] The

[1]Any support petitioner's position might once have derived from the prior decisions of the Seventh and Ninth Circuits cited by the court of appeals (Pet. App. 14a, citing *Tillotson* v. *Boughner*, 350 F.2d 663 (7th Cir. 1965); *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); and *Baird* v. *Koerner*, 279 F.2d 623, 635 (9th Cir. 1960)) has

appropriateness of such an exception is irrelevant for present purposes, however, because, as the court of appeals held, petitioner failed to show that there in fact was a strong possibility that disclosure of the fee information in the criminal tax investigation would implicate him in the narcotics charges for which he sought legal advice from Garber (Pet. App. 14a-15a). Petitioner does not dispute that fact-bound determination, and indeed he relies only in passing upon the attorney-client privilege (see Pet. 9).

b. Petitioner also argued below that the subpoena interfered with his asserted Sixth Amendment right to counsel of his choice because it created the possibility that Garber would be required to testify against him at any trial on the tax charges and thereby lead to Garber's disqualification at such a trial. This argument was properly rejected by the court of appeals. Pet. App. 10a-11a.

There is no Sixth Amendment right to counsel in connection with a grand jury proceeding. The right to counsel attaches only after the initiation of adversary judicial proceedings against the defendant, by indictment or otherwise. *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 14-18; *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6-8. Moreover, even where the protection of the Sixth Amendment has attached, it does not afford the accused an absolute right to be represented by a particular lawyer. The accused is protected, if at all, only against an arbitrary disqualification of counsel. See *In re Doe*, 781 F.2d 238, 250 (2d Cir. 1986) (en banc), petition for cert. pending, No. 85-1334. Disqualification of a lawyer at trial by application of the established ethical principle that a

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since been eliminated by the subsequent decisions by those courts in *In re Witnesses Before the March 1980 Special Grand Jury*, *supra*, and *In re Osterhoudt*, *supra*, cited in the text.

person cannot be both a witness and a lawyer in the same case (if indeed disqualification were ultimately required) is scarcely arbitrary. See *In re Klein*, 776 F.2d 628, 633 (7th Cir. 1985).

Moreover, in this case, any potential right petitioner might possess to have a particular lawyer (Garber) represent him at trial (should he be indicted) was clearly outweighed by the grand jury's right to the fee records. In fact, petitioner's asserted right to counsel of his choice is not significantly implicated by the decision below. The subpoena only sought Garber's fee records in connection with his prior representation of petitioner. Garber was not required to testify or even appear before the grand jury. In addition, as the court of appeals observed (Pet. App. 11a-12a), if petitioner ultimately is indicted, the government would be prepared to consider the production of the records at a prospective trial in a manner (*e.g.*, by stipulation or through the testimony of a bookkeeper) that would not require Garber to testify and therefore to be disqualified from representing petitioner as a result.

As petitioner concedes (Pet. 12), a number of courts of appeals have specifically rejected the notion that the government must demonstrate a particularized need in order for the grand jury to subpoena fee information from a lawyer. *In re Klein*, 776 F.2d 628, 632-634 (7th Cir. 1985); *In re Grand Jury Investigation*, 769 F.2d 1485, 1487 (11th Cir. 1985); *In re Grand Jury Proceedings (Weiner)*, 754 F.2d 154, 155-156 (6th Cir. 1985); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983); cf *In re Osterhoudt*, 722 F.2d at 594-595. Nor, contrary to petitioner's contention (Pet. 12), is there a circuit conflict on this question. Petitioner cites (*ibid.*) the panel decision in *In re Doe*, 759 F.2d 968 (2d Cir. 1985), which held that such a subpoena could be enforced only if the government made a preliminary showing that the information was necessary for

the grand jury's investigation and was not reasonably available from a source other than the attorney. 759 F.2d at 976-977. However, since the petition for a writ of certiorari was filed in this case, the Second Circuit, sitting en banc, has reversed the panel decision upon which petitioner relies and held that no such threshold showing is required. *In re Doe*, 781 F.2d 238 (2d Cir. 1986) (en banc), petition for cert. pending, No. 85-1334.[2]

Petitioner also relies (Pet. 12) on a decision of another panel of the Fourth Circuit that likewise required a threshold showing of need. *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (1982). However, as petitioner concedes, the Fourth Circuit granted rehearing en banc in *Harvey*, and the panel's decision in that case subsequently was vacated by the en banc court because the target became a fugitive. *In re Special Grand Jury No. 81-1 (Harvey)*, 697 F.2d 112 (1982). The panel decision in *Harvey* therefore is of no precedential force in the Fourth Circuit (see *United States* v. *Ricks*, 776 F.2d 455, 465 (4th Cir. 1985); *United States* v. *Morchower*, 718 F.2d 1093 (4th Cir. 1983) (Table)), and indeed the panel of the Fourth Circuit in the instant case did not follow *Harvey*.

The final appellate decision relied upon by petitioner (Pet. 8, 10), *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984), likewise does not support his claim. The First Circuit in that case affirmed an order quashing grand jury subpoenas that required defense attorneys to appear and produce fee and other records in connection with an investigation of the same activities for which their clients were facing an imminent trial in state court. The court of appeals refused to overturn the district court's determination that, because

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[2]By orders dated February 19 and February 24, 1986, respectively, Justice Marshall and Justice Brennan denied an application for a stay of enforcement of the subpoena in the Second Circuit case. No. A-610.

the *timing* of the subpoenas threatened to disrupt the attorneys' performance in the state proceedings and constituted harassment, the government was required to establish that the subpoenaed information was needed at that particularly sensitive moment (751 F.2d at 17-19). The situation in the instant case is wholly different, because Garber's representation of petitioner on the narcotics charges has long since terminated. Moreover, the First Circuit in *In re Grand Jury Matters, supra,* like the court of appeals in the instant case, rejected the argument that the mere possibility that compliance with a subpoena might lead to the disqualification of the attorney from further representation of the client is a "determinative objection" that justifies quashing a subpoena. 751 F.2d at 19.[3]

c. The court of appeals also was clearly correct in concluding that petitioner's Fifth Amendment privilege against compelled self-incrimination was not violated by the subpoena requiring Garber to produce the fee records (Pet. App. 16a). That subpoena did not compel petitioner to do anything. See *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984); *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 6.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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[3]In a later decision sustaining the enforcement of a subpoena issued to an attorney, the First Circuit explained its decision in *In re Grand Jury Matters, supra,* as having been based on "unique factors," including the timing of the subpoena and the finding of harassment. *In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26, 27 (1st Cir. 1985).